UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

Honorable James O. Eastland
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C.

Dear Senator Eastland:

This will refer to your letter of April 7, 1959, relative to S. 1489, a bill "To amend title 28 of the United States Code to provide for certain judicial review of administrative removals and suspensions of Federal employees".

In seeking judicial relief under current practice and procedure, civilian employees of the Government who feel themselves aggrieved as a result of a personnel action affecting their rank, status or pay, are required to file a suit in the United States District Court for the District of Columbia, in the United States Court of Claims, or both. The District Court for the District of Columbia has jurisdiction to pass upon the legality of administrative action and, if appropriate, to direct the complainant's retroactive restoration to duty. It is without jurisdiction, however, to award a money judgment for back pay. The only court with authority to grant such relief is the Court of Claims.

The bill would extend the jurisdiction of the District Court for the District of Columbia, to cover claims for back pay, concurrently with the Court of Claims. Similar jurisdiction would be vested in other District Courts of the United States, the District Court for the Territory of Alaska, the District Court for the Territory of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands. The bill would not affect the jurisdiction of the Court of Claims.

The bill would require suit to be filed within sixty days of the date final administrative action is taken. Litigants would have the option of filing suit in the court within whose jurisdiction they are employed, or, in the United States District Court for the District of Columbia. Upon the commencement of an action, the

agency concerned would be required to file with the court the administrative record of the case, excluding only materials which are privileged or confidential. The scope of review in the district courts would remain unchanged and its decisions would remain subject to review as currently provided under Title 28 of the United States Code.

Comments on the six paragraphs of the bill under the enacting clause follow:

1.

This paragraph would authorize appeals for restoration and back pay by civilian employees of the executive branch of the Government who had been removed from employment or suspended from duty. The term "removal" is defined under Civil Service Regulations, section 1.102(v) as the "separation of the employee from the service for cause". The same section under paragraph (s) defines "suspension" as an "absence from duty without pay required by an appointing officer for disciplinary reasons." Since the terms "removal" and "suspension" denote disciplinary actions, i.e., actions taken for cause, it would appear that the bill as drafted would exclude those employees not separated for cause, such as employees separated in a reduction in force and those furloughed without pay. The exclusion of these employees would seem inconsistent with the aims and purposes of the bill.

An appeal under this paragraph could not be filed until after "final action by the appropriate administrative authority". Inasmuch as the vast majority of civilian employees have either a statutory or regulatory right of appeal to the Commission, the quoted language should be revised to eliminate any doubt that the right of administrative appeal, if available, must be exhausted before resorting to litigation.

2.

The language under this paragraph would require suit to be filed within sixty days "of the final administrative action". Here again it should be made clear that the term "final administrative action" includes the final action on appeal to the Commission, whenever such appeal is made available by statute or regulation. Moreover, the requirement that suit be brought within sixty days after final administrative action in the district court having jurisdiction over the place of employment, or in the District Court for the District of Columbia would not, as written, appear to apply to actions filed in the Court of Claims. The Court of Claims would thus be available to litigants who delay beyond the sixty-day period before bringing suit. It does not appear that such a result is intended.

3.

This paragraph would authorize service of process anywhere in the United States on the appropriate officer or agency of the United States. The Federal Rules of Civil Procedure limit service of process to the territorial jurisdiction of the state in which the district court is held, and beyond the territorial limits of the state where a Federal statute so provides. This bill, if enacted, would extend the territorial limits of service of process beyond state lines.

4.

This paragraph would require the official or agency concerned to file with the court the administrative record of the case, with the exception of privileged or confidential matters. It is not clear what is meant by the term "administrative record". During the progress of a typical administrative appeal involving suspension or removal, an administrative record of the case can be found in the employing agency, in a given field installation of the agency, or both; and upon appeal to the Civil Service Commission a record can be found in its regional office as well as its Central Office. Controversy over the meaning of the term could be avoided by using more definite language.

5 and 6

These paragraphs emphasize that appellate review, as currently provided by Title 28 of the United States Code, would continue to be available and that nothing in the bill would affect the scope of judicial review. The language of this paragraph should make it clear that a suit in one court under this bill would bar suit in any other. Without such restrictive language, it would be difficult to avoid a multiplicity of actions in different courts based upon the same set of facts.

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As previously stated, most if not all civilian employees of the executive branch of the Government have a statutory right of appeal to the Commission. As a result, the members of this Commission are invariably drawn into and are generally named, along with the head of the employing department or agency, as party defendants in litigation involving the validity of a decision of the Commission rendered on appeal. Thus, if the bill is enacted, the Commission, its members, and regional officials will become involved in litigation in the district courts of the United States, Alaska, Panama Canal, Hawaii, Guam, and the Virgin Islands. The cost of such involvement cannot now be

estimated; however, it is safe to say that, if the bill is enacted, the Commission would require a supplemental appropriation to cover the cost of its participation in the defense of litigation authorized under this bill.

The bill would give more than eighty United States District Courts the power to decide whether a department or agency head in the District of Columbia has correctly applied the statute or regulation governing a given removal or suspension. These courts will sometimes differ on matters of statutory construction or the scope of judicial review. Conflicting decisions will also arise between the United States Court of Appeals for the various circuits. It would thus become extremely difficult, if not impossible, to administer with any degree of uniformity the numerous civil-service laws, rules and regulations which touch upon removals and suspensions.

The Commission's regulations, their form and content, are shaped not only by the laws which they are designed to implement, but by court decisions as well. Thus, whenever the Court of Appeals for the District of Columbia, (or the Court of Claims) casts substantial doubt upon the validity of a regulation of the Commission, the regulation is generally amended to conform with the decision of the court. However, if jurisdiction is dispersed as proposed under the bill, whenever conflicting decisions arise between the United States Circuit Courts of Appeal, the prompt amendment of Commission regulations to conform with such decisions would not be possible until the conflicts between the several circuits are reconciled by amendatory legislation or by decision of the Supreme Court. In the interim, because doubt has been cast upon the validity of the regulation which produced the difference of opinion, departments and agencies would be faced with a dilemma: should they proceed to suspend or remove an employee under the regulation in question, or should they stay disciplinary proceedings until the conflict is resolved by amendatory legislation or by the Supreme Court. If they should elect to proceed, the employee may later have a claim for back pay; on the other hand, if they should elect to stay action, the employee whose removal would probably promote the efficiency of the service is permitted to remain on the rolls. The public interest would hardly be served by either result.

It should be noted that while the bill would permit suit to be filed in the judicial district of employment, employees would, in most instances, still have to look to Washington for a final administrative decision by the Commission's Board of Appeals and Review, before initiating legal action. In this connection, it should be further noted that it is not unlikely that employees may be inclined or encouraged, following enactment of the bill, to exhaust their

administrative remedies in a perfunctory manner, reserving their best efforts for the prosecution of their "appeal" in court. This result would be most unfortunate for two reasons: Firstly, because a well prepared case on administrative appeal can, on occasion, spell the difference between success and failure; and secondly, the rule of limited judicial review permits little chance of upsetting an administrative determination which has withstood the rigorous scrutiny of an administrative appeal. Thus, in civil-service matters at least, the value of administrative appeals cannot be minimized without injury to the employee.

S. 1489 does point up the need, however, for some remedial legislation to eliminate the anomaly that while the United States District Court for the District of Columbia has jurisdiction to order the restoration of an individual found to have been improperly removed from his Federal position, it lacks jurisdiction to order back pay for the period of unlawful removal. We see little purpose in requiring a successful litigant in the District Court who has been restored to his position and who, for some reason, is denied by his employing agency or the General Accounting Office the compensation to which he would otherwise be entitled, to institute further litigation for back pay in the Court of Claims. Accordingly, the Commission would favor legislation expanding the jurisdiction of the United States District Court for the District of Columbia, empowering it to award a money judgment for back pay where such relief would be incidental to an order of restoration to duty. This can be accomplished by adding a proviso at the end of the line under Section 1346(d)(2) of Title 28 of the United States Code, as follows:

> Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States; Provided: That this limitation shall not apply to the United States District Court for the District of Columbia in any action for other relief involving employment with the Federal Government.

For the foregoing reasons, the Commission recommends against enactment of S. 1489. It would, however, favor legislation expanding, as set out above, the jurisdiction of the United States District Court for the District of Columbia.

We have been advised by the Bureau of the Budget it has no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,

Chairman